STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLES D. LYONS,

Defendant-Appellant.

UNPUBLISHED
March 20, 2003

No. 238173
Wayne Circuit Court
LC No. 01-001348-01

Before: Cooper, P.J., and Murphy and Kelly, JJ.

PER CURIAM.

Defendant was convicted by a jury of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a) (victim under thirteen years of age), as a lesser offense to the charge of first-degree criminal sexual conduct, MCL 750.520b. He was sentenced to a prison term of three to fifteen years. Defendant appeals as of right. We affirm.

This case arises out of the sexual assault of an eight-year-old girl while she lay in her bed at night and during a time period that defendant was watching the child and the child's mother was working.

I

Defendant first argues that the trial court erred by extensively asking questions of the complainant during her testimony to the extent of invading the role of the prosecutor and creating the appearance that the court believed defendant to be guilty by assisting the prosecutor in obtaining incriminating testimony. Because defendant did not preserve this issue below by objecting to the relevant questioning by the trial court, our review is only for manifest injustice. *People v Paquette,* 214 Mich App 336, 340-341; 543 NW2d 342 (1995).[1] In this regard, reversal based on an unpreserved error in a criminal case requires plain error that resulted in the

[1] While defendant refers to pre-1990 decisions of this Court indicating that objection to a trial court's questioning of a witness is not necessary to preserve the issue for appellate review, the application in *Paquette* of only a manifest injustice review to the unpreserved claim of improper trial conduct by a trial judge constitutes a holding that the issue must be preserved by objection for full appellate review. We are required to follow this holding because *Paquette* was a published opinion of this Court issued after November 1, 1990. MCR 7.215(I)(1).

conviction of an actually innocent defendant or that seriously affected the fairness, integrity, or public reputation of judicial proceedings. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). The first series of questions and remarks challenged by defendant occurred after the complainant apparently stopped responding to the prosecutor's questions. It may be appropriate for a trial court to interject itself into the questioning of a difficult witness, although it should not "pierce the veil of judicial impartiality." *People v Davis*, 216 Mich App 47, 49-50; 549 NW2d 1 (1996). Here, the trial court's conduct does not reflect any obvious partiality as to the charges against defendant, but rather appears to simply have been intended to make the young complainant more comfortable about testifying in court. Accordingly, there was no plain error.

The other challenged questioning by the trial court related to whether the complainant was asserting that defendant put his penis "in" or "on" her, particularly whether she understood the difference between "in" and "on." This was of significance because defendant was charged with CSC I which, in pertinent part, constitutes sexual penetration of a child under thirteen years old, MCL 750.520b(1)(a), while the lesser offense of CSC II, encompassing sexual contact with a child under thirteen years old, MCL 750.520c(1)(a), was also being considered by the jury. Because a trial court may question a witness in order to clarify testimony, *People v Conyers*, 194 Mich App 395, 404; 487 NW2d 787 (1992), we conclude that there was no plain error in the trial court's attempt to clarify the complainant's testimony with regard to whether defendant actually put his penis inside the complainant. Further, inasmuch as the jury convicted defendant of the less serious crime of CSC II, we do not perceive any prejudice to defendant from this questioning. Indeed, the complainant's response that she did not know when asked by the trial judge what "in" and "on" mean may have contributed to the jury's apparent doubt regarding whether sexual penetration, as opposed to simply sexual contact, had occurred.

II

Defendant next argues that the trial court erred by admitting a drawing made by the complainant of male genitals because the drawing was not provided to the defense before trial as required by a pretrial discovery order. We disagree. We review a trial court's decision as to the proper remedy for noncompliance with a discovery order for an abuse of discretion. *People v Davie (After Remand)*, 225 Mich App 592, 597-598; 571 NW2d 229 (1997). In exercising its discretion to determine the appropriate remedy for a discovery violation, a trial court should balance the interests of the courts, the public, and the parties, considering all relevant circumstances including the reasons for noncompliance and whether the objecting party has shown actual prejudice. *People v Banks*, 249 Mich App 247, 252-254; 642 NW2d 351 (2002).

In the present case, the trial court entered a pretrial discovery order that, in pertinent part, required that defense counsel be allowed to examine or be given a copy of "[a]ny document, photograph, or other paper that the prosecuting attorney intends to introduce at trial." The complainant's mother indicated on direct examination by the prosecutor that the complainant drew a picture of "his privacy" for the police. Thereafter, defense counsel moved for a mistrial on the basis that the defense was not advised of the picture pursuant to the discovery order. From the record, it appears that the failure to advise the defense of this drawing prior to trial was the result of an oversight by the police and that the drawing was included in neither the prosecution's nor the defense's "discovery packet." The trial court stated that it did not see a basis for a mistrial, but that it was "absolutely necessary" to recall the complainant to allow defense counsel to cross-examine her about this item. The trial court further stated that it would

instruct the jury that the complainant was being recalled because neither the prosecutor nor defense counsel was aware of the drawing, and it proceeded to so instruct the jury before the complainant was recalled. The trial court did not abuse its discretion in adopting this remedy for any possible discovery violation. Informing the jury that defense counsel had been unaware of the drawing effectively explained to the jury why he had not mentioned it in opening statement or addressed it in his earlier cross-examination of the complainant. Given that defense counsel was afforded an opportunity to question the complainant about the drawing, we do not see any significant prejudice to defendant that would have required greater relief such as a mistrial, particularly considering that the drawing was not a complex item that might have required lengthy time to study.

Defendant further asserts that the trial court improperly indicated to the jury that the complainant actually saw his penis by stating, before the complainant was recalled to testify in relation to the drawing, "It has been brought on the testimony of [the complainant's mother] that a diagram was drawn of [defendant's] penis by [the complainant]." We disagree. This statement merely referred to the complainant's mother's testimony to the effect that the complainant drew what one or both of them believed to be a representation of defendant's genitals. This could not reasonably be understood as a statement or intimation of a personal belief by the trial court regarding whether the complainant had actually seen defendant's penis. Further, defendant did not object to this statement by the trial court. Because, at minimum, the remark at issue did not constitute plain error, this unpreserved matter provides no basis for relief. *Carines, supra.*

III

Next, defendant argues that the trial court erred by allowing the complainant's mother to be present in the courtroom during the complainant's testimony despite its prior sequestration order and by allowing the prosecutor to ask leading questions of the complainant.

With regard to the presence of the complainant's mother, defense counsel interjected, "I have no objection" when the trial court began to state that it was going to ask the complainant's mother to come and sit in the courtroom. This expression of satisfaction with allowing the presence of the complainant's mother during the complainant's testimony constituted a waiver by defendant of any alleged error in allowing her presence. See *People v Carter,* 462 Mich 206, 219; 612 NW2d 144 (2000) (finding waiver where defense counsel "clearly expressed satisfaction with the trial court's decision"). This waiver extinguished any possible error based on the complainant's mother's presence during the complainant's testimony. *People v Riley,* 465 Mich 442, 449; 636 NW2d 514 (2001).

With regard to the trial court allowing the prosecutor to ask the complainant leading questions during her testimony, MRE 611(c)(1) provides that "[l]eading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony." However, "a considerable amount of leeway may be given to a prosecutor to ask leading questions of child witnesses." *People v Watson,* 245 Mich App 572, 587; 629 NW2d 411 (2001). In short, the trial court authorized the prosecutor to use leading questions with the complainant "to the extent necessary." The record reflects that, prior to this, the child complainant responded to more open-ended, non-leading questions about what occurred during the incident with broad, vague answers such as stating that defendant "[j]ust did it" and that he "sexed me" and that the complainant had difficulty responding in a focused way to some

questions. Further, after the trial court's authorization to use leading questions, the prosecutor used such questions to focus the complainant's testimony on what happened at the pertinent time when she and defendant were alone in her bedroom. After this, the trial court sua sponte indicated that the prosecutor should return to "regular questions." It appears that the young complainant did not understand the need to provide more detailed answers or to focus on pertinent matters. In these circumstances, the trial court did not err by temporarily providing the prosecutor leeway to use leading questions in examining the complainant.

Defendant further argues that he is entitled to a new trial based on cumulative error due to the allegations of error discussed previously in this opinion. This claim is not properly presented for review because it is not within the scope of defendant's statement of the issues presented. *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000). Regardless, relief based on cumulative error requires the aggregated effect of the underlying errors to have been seriously prejudicial so as to warrant a finding that a defendant was denied a fair trial. *People v Knapp*, 244 Mich App 361, 388; 624 NW2d 227 (2001). In light of our prior discussion, it is manifest that the alleged errors previously discussed, even if considered in combination, were not seriously prejudicial to defendant.

IV

Defendant argues that the trial court erred by responding to a question from the jury during deliberations in a manner that allowed the jury to infer that defendant had a history of sexual misconduct. We disagree. The jury sent a note to the trial judge asking, in pertinent part, "not sure if able to give this information, but does [defendant] have a previous record of sexual conduct?" The trial court responded by instructing the jury:

> As you have been instructed on a number of occasions, you are to make your factual determinations and conclusion solely from the evidence that's been offered during the course of these proceedings.

The trial court could not have properly given the jury a response that affirmatively told the jury that defendant did not have a prior record of sex offenses because no evidence was introduced at trial regarding whether he did or did not have such a record, and jurors must decide the facts of a case from the evidence received at trial. *People v Schmidt*, 196 Mich App 104, 108; 492 NW2d 509 (1992). Recognizing this, the trial court appropriately responded to the jury's question by instructing them that they must rely on the evidence presented at trial. Thus, we conclude that defendant is not entitled to relief based on this issue because the trial court's instruction sufficiently protected his rights. *People v Phillips*, 251 Mich App 100, 105; 649 NW2d 407 (2002).[2] Further, "[a]s a general rule, juries are presumed to follow their instructions." *People v Torres (On Remand)*, 222 Mich App 411, 423; 564 NW2d 149 (1997). Accordingly, we presume that the jury considered only the evidence offered at trial as opposed to

[2] We note that, even if the trial court had followed trial defense counsel's suggestion to instruct the jury that there was "no evidence" that defendant had a prior record, this would not have precluded speculation by jurors about whether defendant had a prior record that was not placed in evidence.

engaging in speculation about whether defendant had any prior record of sexually oriented crimes. In sum, defendant is not entitled to relief based on this issue.

V

Finally, defendant argues that he was denied a fair trial by remarks by the prosecutor in closing argument that referred to a prospective juror who was excused because she had apparently been molested as a child. Defendant contends that these remarks constituted an improper appeal to juror sympathy. Because defendant did not object to these remarks below, reversal based on this unpreserved issue is warranted only if it involved plain error that resulted in the conviction of an actually innocent defendant or that seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Carines, supra* at 763-764. While the remarks in question may have been ill-advised, we conclude that they do not provide a basis for relief under this standard. We believe that the point of these remarks may not have been merely to engender sympathy for possible sexual assault victims, but to point out that most people would presumably lack experience in evaluating the reactions of actual victims of child sexual abuse. Indeed, the prosecutor expressly stated that he did not want the excused juror on the jury because she would be more sympathetic. Further, we consider it highly unlikely that these remarks affected the outcome of the trial. In addition to the complainant's testimony about defendant subjecting her to inappropriate sexual contact, Officer Wight's testimony indicated that defendant related an implausible version of events in an effort to provide an explanation for the allegations. Given that the complainant was either seven or eight years old at the time of the incident[3] with no indication of any unusual physical limitations, it is difficult to conceive why a caretaker would engage in the odd behavior of pulling down her pants to check if she had defecated in her sleep rather than waking the child if necessary and asking her to check this for herself. Accordingly, we conclude that defendant is not entitled to relief based on this issue.

Affirmed.

/s/ Jessica R. Cooper
/s/ William B. Murphy
/s/ Kirsten Frank Kelly

[3] The complainant testified at trial that she was eight years old and the alleged incident occurred less than a year previously.